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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MUSIC GROUP MACAO COMMERCIAL OFFSHORE LIMITED, a Macao entity, Plaintiff, v. **DAVID FOOTE,** Defendant.	No. **3:14-cv-03078-JSC** **NOTICE OF ADMINISTRATIVE MOTION AND MOTION TO FILE RECENTLY PRODUCED DOCUMENTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** **[No hearing required pursuant to Local Rule 7-11(c)]** **[REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED]**
DAVID FOOTE, an individual, Counter-claimant, v. **MUSIC GROUP MACAO, COMMERCIAL OFFSHORE LIMITED, a Macao entity,** Counter-defendant.	

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TO MUSIC GROUP MACAO COMMERCIAL OFFSHORE LIMITED AND ITS ATTORNEYS OF RECORD, PLEASE TAKE NOTICE that pursuant to Local Rule 7-11 defendant and counter-claimant David Foote ("Defendant") will and hereby does move this Court for an order allowing him leave to file the following documents as supplemental evidence in support of his motion for summary judgment:

1. The job description of Tim Driggers;
2. The employment agreement of Tim Driggers;
3. The employment agreement of Jim Ratchford.[1]
4. The employment agreement of Matthew Wilson;
5. The job description of Matthew Wilson;[2]
6. The employment agreement of Damian Zaremba

Pursuant to Local Rule 7-11(b) any opposition to or support for this motion must be filed no later than four days after the date of the filing of this motion. Music Group would not agree to stipulate to the relief sought in this motion.

Dated: May 20, 2015.

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[1] Music Group has represented that it is unable to find the job description of Jim Ratchford and Damian Zaremba. Ahern Decl. Ex. 7. The documents listed in this notice are attached to the concurrently filed declaration as Exhibits 1–6 (with the exhibit numbers corresponding to the numbers on this notice).

[2] Although the employment agreements state that they include job descriptions as attachments, Music Group has represented that it did not keep many of the employment agreements and the job descriptions together in the ordinary course of business. Declaration of Jared M. Ahern in Support of Motion to File Recently Produced Documents in Support of Motion for Summary Judgment ("Ahern Decl.") Ex.7. Therefore Foote is proposing to submit them as separate documents.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By this Motion Foote requests leave to file three documents that were produced by Music Group on May 15, 2015, two documents that were produced on May 12, 2015, and one document that was produced on April 27, 2015, as supplemental evidence in support of his motion for summary judgment. The evidence—employment agreements and job descriptions for four high-level technology employees at Music Group—is relevant to the issues raised in the motion for summary judgment, as Music Group is contending that is was Foote's contractual responsibility, and nobody else's, to prevent the cyber-attack that Music Group sustained.

There would be no prejudice to Music Group if Foote were permitted to file these documents as supplementary evidence, as they are Music Group business records describing the job duties of Music Group employees. Foote is not requesting leave to make additional argument.

II. BACKGROUND

On January 23, 2015 Foote noticed the 30(b)(6) deposition of Music Group to take place on February 18, 2015. Declaration of Jared M. Ahern in Support of Motion to File Recently Produced Documents in Support of Motion for Summary Judgment ("Ahern Decl.") Ex. 8. Among the noticed topics was "[p]ersonnel responsible for Music Group's computer network and communications infrastructure, including internal and external security measures." *Id.* The notice of deposition also requested production of "[a]ll documents you referred to or referenced in preparing for the deposition." *Id.* The deposition was re-noticed to March 9, 2015 to accommodate the schedule of Music Group's designated witness. Ahern Decl. ¶ 8 & Ex. 9.

Music Group's witness testified that every individual identified on Music Group's organizational chart for the technology department had a written employment agreement, and that those agreements would describe the duties and responsibilities of those individuals. Ahern Decl. Ex. 10. p. 185:11–189:10. In light of this testimony, on March 10, 2015 Foote served a fourth set of discovery requests on Music Group which requested, among other things, "[a]ny and all documents which reflect or refer to the duties of all Music Group employees, indentified in the organizational chart produced by Music Group as MG-000442-000461, including, but not limited to, all written employment agreements as described by Music Group's 30(b)(6) witness during his testimony on March 9, 2015." Ahern Decl. Ex. 11.

With the exception of a job description for Mr. Driggers' position that was produced on April 27, 2015, Music Group did not produce the employment agreements until May 12, 2015 and May 15, 2015, after the Court ordered their production by order dated May 8, 2015. Dkt. No. 75.[3] Meanwhile, Foote filed a motion for summary judgment on April 14, 2015, with a reply deadline of May 5, 2015. Dkt. No. 50.

III. ARGUMENT

A. This Court has Authority to Allow Submission of Supplemental Evidence

This Court has the authority to enter an order allowing Foote to file the supplemental evidence he recently received from Music Group. *See Hoeun Yong v. Ins*, 208 F.3d 1116, 1119 (9th Cir. 2000) ("[A] trial court has the inherent authority to control its own docket and calendar."); *Pacific Coast Container, Inc. v. Royal Surplus Lines Ins. Co.*, 2008 U.S. Dist. LEXIS 108426, at *25 (W.D. Wash. July 8, 2008) (granting leave to file supplemental evidence in relation to motion for summary judgment).

B. Music Group will not be Prejudiced if Leave is Granted

All of the documents Foote seeks leave to file were produced by Music Group, and were internal Music Group documents it has always had in its possession. It will therefore face no surprise or prejudice if the documents are considered by the Court. *Tremont LLC v. Halliburton*

[3] Music Group declined to stipulate to the relief requested in this motion in part based on the assertion that Foote should have asked for the employment agreements previously. Ahern Decl. Ex. 12. As explained below, Music Group should have produced the documents at the March 9, 2015 deposition. Furthermore, as set out in the declaration at Dkt. No. 75-1, Music Group was tactically dilatory in meeting and conferring on this issue after it initially stated it would refuse to produce the agreements on April 9, 2015.

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Energy Servs., 696 F.Supp.2d 741, 788 n.50 (S.D. Tex. 2010) (allowing, over objection, three supplements to the summary judgment record in part because the opposing party was already aware of the documents).

Music Group should have produced all of these documents at its 30(b)(6) deposition, as the notice required a deponent knowledgeable on the subject of "[p]ersonnel responsible for Music Group's computer network and communications infrastructure, including internal and external security measures." Ahern Decl. Ex. 9. The witness should have been educated on this subject, and should have examined employment agreements that Music Group had in its possession as part of his preparation for the deposition. *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989) ("The corporation then must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation."). And because of that review, Music Group should have produced the agreements because the notice of deposition requested "[a]ll documents you referred to or referenced in preparing for the deposition." Ahern Decl. Ex. 9. Music Group can claim no prejudice as a result of its own business records being used to supplement the record relating to the summary judgment motion, especially since the documents should have been produced on March 9, 2015 at Music Group's deposition.

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C. There is Good Cause for Granting Foote Leave to File the Documents

The six documents Foote is asking leave to submit demonstrate the duties of four Music Group employees who worked on IT matters at Music Group. Three of those individuals—Jim Ratchford, Tim Driggers, and Matthew Wilson—had supervisory roles in the company, and the fourth, Damian Zaremba, worked under Wilson and had substantial authority as well. Dkt. No. 51 Ex. 3 (Driggers Depo.) pp. 30:15–31:8 (describing Ratchford's responsibility) & 59:1–29 (describing Driggers as the supervisor of Wilson, and also Wilson and Zaremba's responsibilities). Furthermore, [redacted]

[redacted]

The Court has previously recognized how these documents are relevant. In its order dated May 7, 2015 the Court wrote that:

> Put simply, if Plaintiff specifically hired other individuals for the purposes of ensuring cyber security and preventing attacks, that could be relevant to show that Defendant was not negligent, that his acts did not cause the cyber attack, or both. The duties assigned to other IT staff's employment therefore have bearing on the merits of this case.

Dkt. No. 70 p. 5:3–7.

The documents Foote seeks leave to file show that Music Group did hire other individuals for purposes of ensuring cyber security, and thus those documents are relevant to the merits of this case. [redacted]

IV. CONCLUSION

For the reasons stated herein, Foote requests leave to file the six documents listed in the above-notice to supplement the record on his motion for summary judgment.

Dated: May 20, 2015.

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